CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 898.

INDEPENDENT WAREHOUSES, INC., Self-Insured Employer,

Petitioner,

vs.

REGINA CELESTE DIMINO, widow, on behalf of herself and minor child, JOSEPH LAWRENCE DIMINO, on account of the death of JOSEPH DIMINO, deceased, and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENT INDUSTRIAL BOARD OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN J. BENNETT, JR.,
Attorney General of the State of New York,
Attorney for the Respondent,
State Industrial Board,
The Capitol, Albany, N. Y.

HENRY EPSTEIN,
Solicitor General.

JOSEPH A. MCLAUGHLIN,
ROY WIEDERSUM,
Assistant Attorneys General,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

TABLE OF CONTENTS.

Subject Index.

PAGE

Brief in Opposition to Petition for Writ of Certiorari 1
Proceedings below 1
Opinions below 3
Statement 4
Argument 6
No federal question of substance is presented in the petition or involved in this case.. 6

Cases Cited.

Alaska Packers Association v. Ind. Acc. Commission, 276 U. S. 467..... 7
Dahlstrom Metallic Door Company, *et al.* v. Industrial Board of the State of New York, 284 U. S. 594 6
Grant Smith-Porter Ship Co. v. Rhode, 257 U. S. 469 7
Iuppa & Battle Company, *et al.* v. Industrial Board of the State of New York, 291 U. S. 646..... 7
Miller's Indemnity Underwriters v. Braud, 270 U. S. 59 7
P. J. Carlin Construction Company, *et al.* v. Edward Heaney and the Industrial Board of the State of New York, 299 U. S. 41..... 7
Rosengrant v. Havard, 273 U. S. 664..... 7
Sultan Railway & Timber Co. v. Dept. of Labor & Industries, 277 U. S. 135..... 7
Valley Steamship Co. v. John J. Wattawa, 244 U. S. 202 8

II.

STATUTES CITED.

PAGE

Workmen's Compensation Law of the State of New York (Chapter 816 of the Laws of 1913 as amended and re-enacted by Chapter 41 of the Laws of 1914 and amendments thereto).....1, 6

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 898.

INDEPENDENT WAREHOUSES, INC., Self-Insured Employer,

Petitioner,

vs.

REGINA CELESTE DIMINO, widow, on behalf of herself and minor child, JOSEPH LAWRENCE DIMINO, on account of the death of JOSEPH DIMINO, deceased, and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENT INDUSTRIAL BOARD OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

Now comes the respondent, Industrial Board of the State of New York, in the above entitled matter, by its counsel, and opposes the petition herein.

Proceedings Below.

This was a proceeding under the provisions of the Workmen's Compensation Law of the State of New

York, on behalf of the widow and minor child of Joseph Dimino, deceased employee, for the awarding and payment of compensation benefits accruing to them by reason of the death of said Joseph Dimino resulting from an accident arising out of and in the course of his employment with the Independent Warehouses, Inc.

Following the filing of a claim for compensation by the widow, on behalf of herself and minor child (R. 22), hearings were held before a referee in the Department of Labor and before a member of the Industrial Board of the State of New York, when evidence establishing the claim of the said dependents was introduced into the record. After consideration of all the evidence, the State Industrial Board made a decision and award under the terms of the Workmen's Compensation Law in favor of said widow and minor child (R. 7, 9).

An appeal was thereupon taken to the Appellate Division of the Supreme Court, Third Judicial Department, State of New York, by the employer, Independent Warehouses, Inc. (R. 2).

Formal Findings of Fact and Conclusions of Law were thereafter executed by three members of the State Industrial Board and served on the parties in interest (R. 3-5).

The Appellate Division of the Supreme Court, Third Judicial Department, by order entered June 25, 1940, reversed the award and dismissed the claim, with one Justice dissenting (R. 72). Thereafter, the Industrial

Board of the State of New York and the claimant appealed to the Court of Appeals (R. 73, 74).

The Court of Appeals on December 31, 1940 ordered and adjudged that the order of the Appellate Division of the Supreme Court, Third Judicial Department, appealed from be reversed and the award of the State Industrial Board affirmed, with two Judges dissenting, and remitted the matter to the said Appellate Division (R. 76-80). On January 28, 1941, the said Appellate Division made the order and judgment of the Court of Appeals its order, reversing its previous order and affirming the findings of the State Industrial Board (R. 80, 81).

Opinions Below.

The decision of a member of the Industrial Board of the State of New York appears in the record at page 15; the Findings of Fact and Conclusions of Law of the Industrial Board of the State of New York executed by three members thereof appear in the record at pages 3 to 5; and are not elsewhere reported.

The decision of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, is reported in 259 App. Div. 942 and appears in the record at page 72.

The opinion of the Court of Appeals of the State of New York is reported in 284 N. Y. 481 and appears in the record at pages 76 to 78.

Statement.

The employer, the Independent Warehouses, Inc., was engaged in the warehouse business (R. 18). It stored newsprint rolls on a pier and facilitated their distribution on trucks to various newspaper plants (R. 31, 32). It is not claimed that the employer owned, chartered or operated any boat or ship.

Joseph Dimino, the deceased employee, was a pier superintendent. His principal duty was to direct the delivery by trucks of newsprint rolls, which had been unloaded from ships onto the pier, and to see that the trucks were loaded for distribution to the various newspaper plants (R. 32, 33).

He supervised and had charge of men employed solely by Independent Warehouses, Inc. (R. 31, 32, 48, 63), checked the sequence of deliveries, and occasionally investigated delays, gave information to the stevedore and conferred with the hatch boss (R. 48-50, 61).

His duties were entirely on the pier (R. 41, 42) and started from the time the paper hit the dock (R. 40).

Incidental to his pier duties, he occasionally went upon the ships for the purpose of locating rolls of paper intended for certain newspaper plants (R. 33, 43, 44, 63). He was not required or compelled to go on board the ship, but evidently found it a matter of convenience or expedient to do so (R. 39, 44).

He had no authority, control or supervision over the stevedores or longshoremen engaged in connection

with the loading and unloading of the ships. He had nothing to do with the loading or unloading of the cargo or with the removal of merchandise from the ships (R. 31, 32, 41, 42, 44, 63). The loading and unloading were supervised and effected by the boss stevedore of another employer, operating independently of Dimino's employer (R. 42, 44, 45, 60).

The decedent was an employee of the Independent Warehouses, Inc. only (R. 18, 42, 48, 60). He had nothing to do with the operation or navigation of the ships (R. 40). He was neither in the service nor under the control of the ships, the owner of the vessels, the stevedore, or the United States Trucking Corporation which hauled the paper rolls from the pier. His activities were in the interest of his employer's customers on land.

While aboard a ship at the pier and while investigating and checking newsprint rolls, Dimino fell into an open hatchway, receiving injuries which resulted in his death (R. 17, 50).

At the time of the hearings, counsel for the petitioner-employer confirmed the fact that the decedent had no connection with the unloading of the vessels and exercised no authority over the stevedores.

> "Q. And the ship was unloaded under the instructions of Mr. Dimino? A. Yes, sir.
> Mr. Lauer: Well, your Honor, that is not correct. The stevedores did the unloading entirely" (R. 44).

Argument.

No federal question of substance is presented in the petition or involved in this case.

The principal issue before the Court of Appeals of the State of New York in the case at bar concerned the question whether the evidence in the record as a matter of law was sufficient to sustain the findings of fact of the Industrial Board of the State of New York.

The State Industrial Board made, among others, the following findings of fact:

> "7. The said Joseph Dimino had no direct supervision or control of the stevedores and the loading and unloading of freight from the ship was performed by another independent stevedoring employer.
>
> The presence of the decedent on the ship was wholly incidental to his employment on the dock and arose out of problems connected with such work" (R. 4).

The Industrial Board also found as follows:

> "6. At the time the said Joseph Dimino sustained the accidental injuries which resulted in his death, he was not engaged in performing any work of a maritime character or nature and said work bore no relation to navigation but was a matter of local concern" (R. 4).

Exclusive jurisdiction to decide questions of fact is conferred on the Industrial Board by the Workmen's Compensation Law of the State of New York. Questions of law only may be considered by the Appellate Courts on appeal in a Workmen's Compensation proceeding. *(Dahlstrom Metallic Door Company,*

et al. v. Industrial Board of the State of New York, 284 U. S. 594, *Iuppa & Battle Company, et al. v. Industrial Board of the State of New York*, 291 U. S. 646, *P. J. Carlin Construction Company, et al. v. Edward Heaney, et al.*, 299 U. S. 41.)

The Court of Appeals held as a matter of law that the findings of the State Industrial Board were amply supported by the evidence in the record (R. 76-78).

Consequently the petitioner's repeatedly alleged facts, constituting the foundation of the petitioner's argument and to the effect that the decedent exercised authority over the stevedores or control over the unloading of ships, or instructed and ordered the stevedores to unload the ships, must be rejected in the consideration of this case.

In the light of the facts disclosed by the record supporting the findings of the Industrial Board, it follows that the decedent was engaged in a non-maritime employment or service, the liability of the employer arose from a non-maritime contract and the matter was entirely of local concern.

Grant Smith-Porter Ship Co. v. Rhode, 257 U. S. 469;

Miller's Indemnity Underwriters v. Braud, 270 U. S. 59;

Rosengrant v. Havard, 273 U. S. 664;

P. J. Carlin Construction Co., et al. v. Edward Heaney, et al., 299 U. S. 41;

Sultan Railway & Timber Co. v. Dept. of Labor & Industries, 277 U. S. 135;

Alaska Packers Association v. Ind. Acc. Commission, 276 U. S. 467.

The petitioner also seeks to present for consideration of this Court an alleged constitutional or federal question in respect to the sufficiency of evidence supporting "the finding or conclusion of fact of the State Industrial Board, as approved by the Court of Appeals of New York, to the effect that Joseph Dimino had no direct supervision or control of the stevedores." It appears sufficient to say that a constitutional or federal question of this nature was never raised or passed upon in any of the Courts below. *(Valley Steamship Co. v. John J. Wattawa,* 244 U. S. 202.)

WHEREFORE, it is respectfully submitted that the petition herein should be denied, or, in the alternative, dismissed.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney General of the State of New York,
Attorney for the Respondent, State Industrial Board.

HENRY EPSTEIN,
Solicitor General,
Solicitor for Respondent, State Industrial Board,
The Capitol,
Albany, New York.

JOSEPH A. MCLAUGHLIN,
ROY WIEDERSUM,
Assistant Attorneys General,
Of Counsel.